FILED
COURT OF APPEALS
DIVISION II
2013 FEB -6 PM 1:27
STATE OF WASHINGTON
BY
DEPUTY

No. 43784-8-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

Lewis County Superior Court
Cause No. 11-1-00980-1

STATE OF WASHINGTON

Plaintiff/Respondent

vs.

MARK E. D'ENTREMONT

Defendant/Appellant

APPELLANT'S REPLY BRIEF

CHARLES W. LANE, IV
The Law Office of Charles W. Lane, IV, PLLC
1800 Cooper Point Road SW, Building 3
Olympia, WA 98502
(360) 352-8887

Attorney for Defendant/Appellant Mark E. D'Entremont

ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Cases

A. UNREFUTED FACTS SHOW THE SEARCH WAS UNLAWFUL

The basis for the State's position that the search was lawful requires the factor of the marijuana being smelled from a lawful vantage point. However, the State's argument fails based on U.S. v. Rey, 680 F.3d 1179 (9th Cir. 2012), a similar case, where law enforcement searched the curtilage of the defendant's home when they entered the carport.

In Rey, Boarder Patrol went to the defendant's home to conduct a "knock and talk". The court held that the carport was the curtilage and was protected by the Fourth Amendment. The court also held that once an attempt to initiate a consensual encounter with the occupants of a home fails, the officers should end the knock and talk and change their strategy by retreating cautiously, seeking a search warrant or conducting further surveillance. Rey at 1188.

In Rey, Boarder Patrol agents observed a suspected undocumented alien cross the boarder fence and take a taxi to the defendant's home. The agents followed the then suspected alien onto Mr. Rey's property and detained he and Mr. Rey near the side door entrance under the carport. Agents then ordered everyone out of the home. Rey moved to suppress the evidence of the warrantless search and seizure, which was denied by

the trial court. The Ninth Circuit Court of Appeals reversed the trial court because it determined that the agents physically occupied the curtilage of the home without obtaining a warrant, and no exceptions to the warrant justified the search and seizure. The Ninth Circuit Court of Appeals did a very thorough analysis of the curtilage issue and 4th Amendment protection, citing U.S. v. Troop, 514 F.3d 405, 410 (5th Cir. 2008) wherein the 5th Circuit held that once an attempt to initiate a consensual encounter with the occupants of the home fails, "the officers should end the knock and talk and change their strategy by retreating cautiously, seeking a search warrant, or conducting further surveillance". In Rey, the 9th Circuit similarly held citing Troop that the Boarder Patrol agents violated the Fourth Amendment when they conducted a warrantless search after there was no response to a knock and talk attempt.

The issues raised in Rey and Troop are identical to the situation before this court. The unrefuted facts as presented in Respondent's Brief show that:

> "Deputy Engelbertson explained that "I walked up and knocked on the man door because that is where the truck was just at and I assumed someone was in the shop at that point." RP 14. Deputy Engelbertson further explained that because he knew two people were involved that he

> wanted to make sure "someone wasn't in there either caregiving possible plants, working on something, so I knock on the man door first." RP 14; CP 37. Deputy Engelbertson could hear noise from inside the building, including fans, but no one answered the door. CP 38. The officers walked over to the main residence and knocked but could not locate anyone to speak to. RP 14; CP 38. The officers then went back to the outbuilding one last time because Deputy Engelbertson had heard noises out there and knocked on the door again. RP 14. Detective Kimsey, while standing by the middle outbuilding, smelled the distinct odor of marijuana coming from the building. CP 38." See Respondent's Brief, page 12.

As the State concedes, the detective did not smell marijuana until they went back to the middle outbuilding for a second time. See Respondent's Brief, page 12. This is directly contrary to Rey and Troop. The detectives should have left after getting no response at the residence. Instead, they continued to search knowing that no one was home.

CONCLUSION

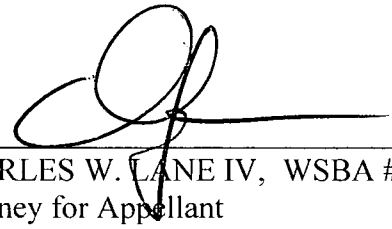
There is no probable cause to support the warrant. Any information gained by the detectives' entry onto the property was obtained in violation

of Mr. D'Entremont's constitutional rights to privacy and thus are excluded, therefore there is insufficient evidence to establish probable cause for the warrant.

For the foregoing reasons, the warrant should be invalidated.

DATED this 2nd day of February, 2013.

LAW OFFICE OF CHARLES W. LANE IV



CHARLES W. LANE IV, WSBA #25022
Attorney for Appellant

No. 43784-8-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

FILED
COURT OF APPEALS
DIVISION II
2013 FEB -8 PM 1:22
STATE OF WASHINGTON
BY
DEPUTY

Lewis County Superior Court
Cause No. 11-1-00980-1

STATE OF WASHINGTON

Plaintiff/Respondent

vs.

MARK E. D'ENTREMONT

Defendant/Appellant

DECLARATION OF SERVICE

CHARLES W. LANE, IV
The Law Office of Charles W. Lane, IV, PLLC
1800 Cooper Point Road SW, Building 3
Olympia, WA 98502
(360) 352-8887

Attorney for Defendant/Appellant Mark E. D'Entremont

ORIGINAL

COMES NOW, NAVEVE K. VAN HOOF, under penalty of perjury of the Laws of the State of Washington and declares as follows:

1. I am over the age of 18 years of age and not a party to the above-entitled action. I am competent to be a witness in the action.

2. I certify that on February 6, 2013, I served a true and correct copy of the **Appellant's Reply Brief** in the above entitled action, on Sara Beigh, by personally leaving the same with the receptionist at the Lewis County Prosecuting Attorney's Office.

3. I certify that on February 6, 2013, I served a true and correct copy of the **Appellant's Reply Brief** in the above entitled action, by placing said document in the United States Mail, postage prepaid, addressed to the following:

Mark E. D'Entremont
304 W. Reynolds Avenue
Centralia, WA 98531

DATED this 6th day of February, 2013 at Olympia, Washington.

Navieve K. Van Hoof

NAVIEVE K. VAN HOOF
Paralegal To Charles W. Lane, IV